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No. _____

In The

Supreme Court of the United States

ZYROON KHAN,

Petitioner,

v.

ABERCROMBIE & FITCH,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the District Court's denial of Petitioner's right to conduct discovery into Respondent's prior acts of discrimination departed so far from the accepted legal standard for permitting such discovery as to prejudice Petitioner's ability to prove that Respondent discriminated and retaliated against her and such departure was sanctioned by the Court of Appeals.

2. Whether the Court of Appeals failed to apply a de novo standard of review to Petitioner's appeal, thereby erroneously affirming the District's Court's finding that Petitioner did not establish a prima facie case of retaliation by Respondent and did not rebut the allegedly non-discriminatory reason proffered by Respondent in explanation for placing Petitioner on probation.

PARTIES TO THE PROCEEDINGS

The caption of the case contains the names of all parties to the proceedings in the court whose judgment is sought to be reviewed, and there is no parent or subsidiary company required to be listed by S. Ct. R. 29.6.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

THE SECOND CIRCUIT COURT OF APPEALS' DECISIONS CONCERNING IMPORTANT ISSUES ARE IN CONFLICT WITH THE DECISIONS OF ITS SISTER COURTS AND REPRESENTS A MISCARRIAGE OF JUSTICE, AND DEPARTS SO FAR FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR

AN EXERCISE OF THIS COURT'S SUPERVISORY POWER. 9

CONCLUSION 28

APPENDIX

A. COURT OF APPEALS' SUMMARY ORDER ..... App. 1

B. ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK AFFIRMING THE DISCOVERY RULINGS OF MAGISTRATE JUDGE JOAN M. AZRACK ..... App. 4

C. MEMORANDUM AND ORDER THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ..... App. 5

D. JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ..... App. 20

E. DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS ..... App. 21

TABLE OF AUTHORITIES

CASES:

Anderson v. Liberty Lobby, Inc. 477 U.S. 242 (1986) ... 19

Bedoya v. Coughlin, 91 F.3d 348 (2d Cir. 1996) 18

Boyce v. New York City Mission Soc'y, 963 F. Supp. 290 (S.D.N.Y. 1997) 19

Byers v. City of Alberquerque, 150 F.3d 1271 (10th Cir. 1998) 18

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 19

Chambers v. TRM Copy Centers Corp., 43 F.3d 29 (2d Cir. 1994) 10, 22, 23, 27

Dominique v. Weld, 73 F.3d 1156 (1st Cir. 1996) 18

Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992) 18

Estes v. Dick Smith Ford, Inc., 856 F.2d 1097 (8th Cir. 1988) 11, 16, 17

Flanagan v. Travelers, Ins. Co., 111 F.R.D. 42 (W.D.N.Y. 1986) 14-16

Hairston v. Ginesville Sun Publ'g Co., 9 F.3d 913 (11th Cir. 1993) 18

Henry v. Daytop Village, Inc., 42 F.3d 89 (2d Cir. 1994)

. . . . . 25, 26

Heyne v. Caruso, 69 F.3d 1475 (9th Cir. 1995) 13, 17

Higgins v. E.I. Dupont de Nemours & Co., 863 F.2d 1162 (4th Cir. 1998) 18

Hunter v. Allis-Chalmers, 797 F.2d 1417 (7th Cir. 1986) 10, 11

Hurley v. Atlantic City Police Dep't, 933 F. Supp. 396 (D.N.J. 1996) 13

King v. Ames, 179 F.3d 370 (5th Cir. 1999), *cert. denied*, 519 U.S. 1055 (1997) 18

McCaslin v. Wilkins, 183 F.3d 775 (8th Cir. 1999) 18

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 96 S. Ct. 1817 (1973) 19, 25

Mullen v. Princess Anne Volunteer Fire Co., Inc., 853 F.2d 1130 (4th Cir. 1988) 11, 12

National Wildlife Federation v. Browner, 127 F.3d 1126 (D.C. Cir. 1997) 18

Olson v. General Elec. Aerospace, 101 F.3d 947 (3d Cir. 1996) 18

Provenz v. Miller, 102 F.3d 1478 (9th Cir. 1996), *cert. denied*, 118 S. Ct. 48 (1997) 18

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 1010 S. Ct. 1089 (1981) 19

Thomas v. Medco, No. 95 Civ. 8401(JES)(MHD), 1998 U.S. Dist. LEXIS 13158 (S.D.N.Y. August 26, 1998) 21

United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 103 S. Ct. 1478 (1983) 10, 25

Webb v. Hyman, 861 F. Supp. 1094 (D.D.C. 1994) 10

West v. Philadelphia Elec. Co., 45 F.3d 7444 (3d Cir. 1995) 12, 13, 17

Wilborn v. Primary Care Specialists, Ltd., 866 F. Supp. 364 (N.D. Ill. 1994) 19

Wilson v. Williams, 997 F.2d 348 (7th Cir. 1993) 18

Zahorik v. Cornell University, 98 F.R.D. 27 (1983) . 13, 14

STATUTES:

28 U.S.C. 1254(1) 2

42 U.S.C. 1981 ..... 2, 9

42 U.S.C. Section 2000e, et seq. 2, 9

RULES AND REGULATIONS:

Fed. R. Civ. P. 26 15

Fed. R. Evid. 403 ..... 12, 16

Fed. R. Evid. 404(b) 12

PETITION FOR WRIT OF CERTIORARI

Petitioner Zyroon Khan (hereinafter "Petitioner") prays that the United States Supreme Court grant a writ of certiorari to review the United States Court of Appeals for the Second Circuit opinion below.

OPINIONS BELOW

The Court of Appeals' opinion is unreported, but is reprinted in the appendix hereto, p. 1.

The Order of the District Court denying Petitioner's appeal of and affirming the discovery rulings of Magistrate Judge Joan M. Azrack is reprinted in the appendix hereto, p. 4.

The Memorandum and Order of the District Court granting Respondent's Motion for Summary Judgment is reported at 35 F. Supp. 2d 272 (E.D.N.Y. 1999) and is reprinted in the appendix hereto, p. 5.

The Judgment of the District Court granting Respondent's Motion for Summary Judgment is reprinted in the appendix hereto, p. 20.

JURISDICTION

The Court of Appeals entered its Summary Order on December 28, 1999. Petitioner invokes this

Court's jurisdiction pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, et seq.

2. Title 42 U.S.C. Section 1981 provides in pertinent part that:

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens....

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

STATEMENT OF THE CASE

I. The Underlying Facts

Respondent Abercrombie & Fitch (hereinafter "Respondent") sells clothes and other merchandise nationwide in more than one hundred and seventy stores. It maintains a Security Department that is

responsible for security in all its stores. This department consists of a Director of Security, Security Investigators, Security Supervisors, and Security Guards. Timothy Moore (hereinafter "Moore") is Respondent's Director of Security. Moore was employed by Respondent on August 5, 1996.

Petitioner is a Black woman. On December 1, 1987, she was employed by Respondent as a Shipping and Receiving Manager. On or about March 12, 1995, she was promoted to Security Supervisor. At the time she commenced this action, Petitioner still held that job title. She reports directly to Moore. Prior to August 5, 1996, Petitioner's supervisor was Dean Brocious (hereinafter "Brocious").

Petitioner works at Respondent's South Street Seaport and Staten Island Mall stores in New York City. From March 12, 1998 through August 22, 1996, Petitioner's duties included apprehending shoplifters, resolving problems that could contribute to increased shoplifting in the stores, managing the security guard staff, and conducting checks of store employees' personal property whenever they exited the store.

Powell Williams (hereinafter "Williams") was the District Manager for Respondent's New York District. This district includes the Staten Island Mall and South Street Seaport stores. Williams became District Manager in May 1996.

On June 12, 1996, Petitioner, Williams and another of Respondent's employees were closing the Staten Island Mall store when Petitioner asked to check Williams' bag. Williams rudely informed Petitioner that he would not allow her to check his bag and walked away. On June 13, 1996, Petitioner submitted to

Brocious a written report of Williams' conduct.

After learning of Petitioner's report, Williams told several of Petitioner's co-workers that Petitioner was a "black bitch". Petitioner first learned of Williams' disparagement from the Staten Island Mall Store Manager, Greg Holtz (hereinafter "Holtz"). Holtz told Petitioner that Williams had called her a "black bitch" because she had reported his behavior to Brocious. Petitioner reported this information to Brocious and to Jane Ramsey (hereinafter "Ramsey"). At that time, Ramsey was Respondent's Vice President of Human Resources.

On August 22, 1996, Moore met with Petitioner to give her a "performance review." During the review, Moore informed Petitioner that she was placed on probation. She was given a memorandum, dated August 13, 1996, titled "Probationary Goals". The memorandum was written by Moore and Ramsey. It stated that Petitioner had not "earned the trust and credibility of many important people in her district."

Moore claimed that Ramsey told him Petitioner gossips, exaggerates, and manipulates and intimidates others. Also, he claimed that he did not ask Ramsey about specific details, such as the names of those people Petitioner gossiped with, manipulated or intimidated. His explanation for not inquiring about the alleged conduct of which Petitioner was accused was that it was "all in the past."

Moore's probationary memorandum stated that Petitioner had questionable judgment in "handling situations". Additionally, it stated that Petitioner had allegedly failed to inform Human Resources of a "sexual harassment concern". Moore does not know

who was involved in the incident nor what was the concern. Petitioner advised Moore that she did not know about any sexual harassment issue and, therefore, could not have failed to report one.

Respondent also alleged that Petitioner had exited a store with a sensormatic in her pocket in order to "falsely apprehend someone for theft".[1] No written report of this incident existed prior to the filing of Petitioner's discrimination complaints. Moore claimed that he learned of the incident from a Security Investigator, John Carriero (hereinafter "Carriero"). Carriero did not witness the alleged incident. Moore is not sure when the incident occurred.

Additionally, Carriero allegedly wrote and signed a statement that Petitioner admitted placing a sensormatic in her pocket to activate the security alarm and search suspicious shoppers. This statement is dated June 1, 1998, 5:00 p.m., two years after the alleged incident supposedly occurred and one day before Petitioner received a notice of deposition from Respondent. Carriero prepared the statement at Moore's request. The person Petitioner allegedly followed out the door with the sensormatic device actually was a shoplifter.

Before her probation, Petitioner investigated and resolved various in-store security problems in addition to her basic job responsibilities. She was given authority to do so by Brocious, who was supervising her training for the position of Security Investigator. Brocious had promised Petitioner that she would be

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[1]A sensormatic is a security alarm tag which triggers an alarm if taken past the entrance of a store.

given the next available position of Security Investigator. In her 1995 performance evaluation, Brocious recommended that Petitioner be given more responsibility and her skills developed for future opportunities.

During the probation meeting with Petitioner, Moore reduced the scope of Petitioner's responsibilities and authority and told her that she no longer would have the additional investigative duties. Petitioner refused to sign Moore's memorandum because the allegations it contained were not true. She expressed her concern about the effects of probation on the promotion Brocious promised her. Moore advised her that if she signed the memorandum, she would retain all of her employment benefits and promotional opportunities. Petitioner still refused to sign the memorandum.

The terms of Petitioner's probation were that (1) it would last for 90 days, (2) she would be further disciplined or terminated if it was determined during those 90 days that she was making insufficient progress towards achieving the goals set for her, and (3) she would be terminated if, after those 90 days, it was determined that she did not meet those goals. Her guideline for achieving these goals was to refrain from conduct she had not engaged in.

Prior to her complaint about Williams' racist remark, Petitioner never was notified of any written nor verbal complaints from anyone employed by Respondent about misconduct on her part. No documentation of her alleged lack of credibility, trustworthiness or good judgment existed prior to August 13, 1996, the date of Moore's probationary

memorandum.

On August 28, 1996, Petitioner filed a charge of discrimination with the New York State Division of Human Rights. Her charge alleged that Respondent placed her on probation and retaliated against her for her complaints about Williams' racist comments.

Respondent claims that Williams received a written "final warning" for calling Petitioner a "black bitch." The document Respondent produced is dated October 2, 1996, four months after Williams first referred to Petitioner in a racially and sexually derogatory way and subsequent to the filing of Petitioner discrimination charge.

On January 31, 1997, Petitioner was issued a Right-to-Sue Letter from the Equal Employment Opportunity Commission. On May 2, 1997, she filed a federal complaint against respondent on the grounds that Respondent discriminated and retaliated against her and subjected her to a hostile work environment for complaining of Williams' racist conduct.

II. The Proceedings Below

Petitioner commenced this action against Respondent on May 27, 1997. During pre-trial discovery, Petitioner requested that Respondent produce evidence of prior complaints of discrimination against Respondent and its employees. Respondent objected to Petitioner' s request and asked the District Court to enforce its objections. Petitioner's discovery requests and Respondent's objections thereto are reprinted in the appendix hereto, p. 21.

On June 23, 1998, after a conference with counsel

for the parties, Magistrate Judge Joan M. Azrack of the United States District Court for the Eastern District of New York limited Petitioner's discovery of prior complaints of discrimination to only one of Respondent's employees - Williams. Additionally, Magistrate Judge Azrack denied Petitioner's request to depose both Williams and Respondent's Chief Executive Officer, Michael Jeffries. She ruled that Plaintiff could depose Willaims only.

Petitioner appealed Magistrate Judge Azrack's rulings to United States District Court Judge I. Leo Glasser. In an Order dated September 10, 1998, Judge Glasser denied Petitioner's appeal. In October, 1998, Respondent moved the District Court for summary judgment against Petitioner.

In a Memorandum and Order, dated February 26, 1999, the District Court granted Respondent's Motion for Summary Judgment. It held that Petitioner did not suffer any adverse employment action and could not establish a prima facie case of employment discrimination. Additionally, the District Court ruled that Petitioner was not subjected to a hostile work environment. Petitioner's retaliation claim was dismissed on the grounds that Petitioner could not establish a causal connection between her complaint of discrimination against Williams and Moore's decision to place her on probation.

A Judgment against Petitioner was entered in the District Court on March 11, 1999.

On April 7, 1999, Petitioner appealed both the District Court's grant of Summary Judgment to Respondent and its affirmation of Magistrate Judge Azrack's discovery rulings to the Court of Appeals for

the Second Circuit. Petitioner contended that the District Court's grant of summary judgment to Respondent was erroneous as genuine issues of fact exist in this case. Additionally, Petitioner contended that the District Court' discovery rulings were clearly erroneous and contrary to law.

In a Summary Order dated December 28, 1999, the Court of Appeals affirmed the District Court's grant of summary judgment for the reasons stated in the Memorandum and Order of the District Court. It affirmed the District Court's discovery rulings on the grounds that Petitioner's request was not reasonably calculated to elicit admissible evidence and would have imposed a greater burden on Respondent than benefit to Petitioner.

The basis for the District Court's jurisdiction is 42 U.S.C. Section 2000e et seq., 42 U.S.C. Section 1981, and the doctrine of pendant jurisdiction.

REASONS FOR GRANTING THE WRIT

THE SECOND CIRCUIT COURT OF APPEALS' DECISIONS CONCERNING IMPORTANT ISSUES ARE IN CONFLICT WITH THE DECISIONS OF ITS SISTER COURTS AND REPRESENTS A MISCARRIAGE OF JUSTICE, AND DEPARTS SO FAR FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

I. The Court of Appeals' Decision to Affirm the District Court's Discovery Ruling Conflicts With Well-established Precedent

The District Court's denial of Petitioner's right to conduct discovery into Respondent's prior acts of discrimination departed so far from the accepted legal standard for permitting such discovery that it prejudiced Petitioner's ability to prove that Respondent had discriminated and retaliated against her. This departure from well-established legal precedent was sanctioned by the Court of Appeals.

Numerous circuits have held that evidence of prior discrimination complaints is admissible. The Second Circuit noted in *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994) that, "Because an employer who discriminates is unlikely to leave a 'smoking gun' attesting to a discriminatory intent, a victim of discrimination is seldom able to prove his claim by direct evidence, and is usually constrained to rely on circumstantial evidence". Consequently, to establish her employer's liability, a plaintiff may proffer circumstantial evidence of the discriminatory conduct complained of. Admissible circumstantial evidence includes prior acts of discrimination by the employer. *Webb v. Hyman*, 861 F. Supp. 1094 (D.D.C. 1994). *See also, United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 103 S. Ct. 1478 (1983) (stating that evidence of an employer's discriminatory attitude in general is relevant and admissible to prove racial discrimination).

In *Hunter v. Allis-Chalmers*, 797 F.2d 1417 (7th Cir. 1986), the Seventh Circuit held that, in cases where the

plaintiff alleges that she was subjected to discrimination which her employer either condoned or failed to stop, the employer's liability depends on proof that it acted unreasonably. The frequency of misconduct by the victim's co-workers is critical to proof of that unreasonableness, therefore, evidence of the employer's prior discrimination is pertinent to the plaintiff's case. *Id.* at 1424.

The Eight Circuit disallowed pre-trial exclusion of prior conduct evidence in a discrimination case in *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir. 1988). In that case, the plaintiff alleged race discrimination by his former employer and sought to introduce evidence showing that the defendant tended not to hire blacks and that the number of blacks in the defendant's work force was small. The court noted that it would be difficult to show that such prior conduct evidence was irrelevant to the issue of whether the employer did discriminate against the plaintiff. *Id.* at 1103.

In *Mullen v. Princess Anne Volunteer Fire Co., Inc.*, 853 F.2d 1130 (4th Cir. 1988), the Fourth Circuit explained why such evidence is admissible in employment discrimination cases. Eyewitness testimony to an employer's mental process is rare. Prior discriminatory conduct is indicative of such processes. Additionally, it is evidence of the employer's intent, motive and knowledge. Even when prior conduct evidence does not relate to the specific instances of discrimination alleged by the plaintiff, it tends to show the employer's attitude towards the plaintiff's class. *Id.*

Additionally, *Mullen* clarifies why, despite the

prohibition of Fed. R. Evid. 403, prior conduct evidence is admissible in discrimination cases. When a plaintiff seeks to show discriminatory intent, evidence of prior conduct reveals the defendant's attitude and is greatly probative. *Mullen*, 853 F.2d at 1130. Rejecting the argument that prior conduct evidence in a discrimination case is unduly prejudicial, the *Mullen* court noted that Rule 403 is concerned only with "unfair" prejudice. *Id.* at 1134. It pointed out that the reason the defendants sought to exclude the plaintiff's evidence was the very reason it should be admitted -- the emotional reaction the defendants knew its conduct would elicit from a jury was indicative of the offensiveness of its conduct. *Id.* That court advised that the evidence an employer may seek to exclude under Rule 403 should be admitted under Fed. R. Evid. 404(b). *Mullen*, 853 F.2d at 1133.

In *West v. Philadelphia Elec. Co.*, 45 F.3d 7444 (3d Cir. 1995), the Third Circuit held that a district court's exclusion of prior discriminatory conduct is an abuse of discretion. The plaintiff in *West* sought to introduce evidence of prior acts of discrimination by the defendant. The district court limited the plaintiff's evidence to those incidents that involved either the same offender or the same form of discriminatory conduct. Reasoning that a fact-finder should be allowed to see the plaintiff's work environment as a whole, the West court endorsed a "totality of the circumstances" approach to deciding the admissibility of evidence of an employer's prior discriminatory conduct. It warned that an employer's conduct could seem legitimate in one incident, but appear discriminatory when viewed in the context of multiple

related incidents. *Id.* at 756.

Furthermore, an employer could nurture a discriminatory work atmosphere by implicitly condoning harassing behavior. Such an atmosphere could exist even if the form of discrimination and the identity of its practitioners changed over time. *Id.* at 756-57. The Third Circuit found prior conduct evidence relevant to the issue of the employer's notice of racial harassment and its duty to investigate and remedy the hostile work environment. *Id.* at 756 n.10.

The existence of a discriminatory work environment depends on "nuances, motives, gestures, the way things are said, and workplace customs". *Hurley v. Atlantic City Police Dep't*, 933 F. Supp. 396 (D.N.J. 1996). Consequently, discriminatory work environment claims are difficult for a jury to evaluate and even more difficult for a plaintiff to prove. *Id.* Evidence of discrimination against the plaintiff's co-workers allow the jury to assess the defendant's intent and evaluate their response to the plaintiff's complaints of discrimination. *Id. See also, Heyne v. Caruso*, 69 F.3d 1475 (9th Cir. 1995) (rejecting the defendant's argument that plaintiff's evidence of other women being harassed by the defendant is unduly prejudicial and should be excluded, the court held that an employer's treatment of other employees is relevant to and probative of the issue of its discriminatory intent towards the plaintiff).

In *Zahorik v. Cornell University*, 98 F.R.D. 27 (1983), the plaintiff requested information on prior complaints of discrimination against her employer, the investigation of those complaints and the outcome of the investigations. The defendant objected to those requests. Citing the plaintiff's heavy burden of proof in

an employment discrimination case, the court held that the evidence requested by the plaintiff was relevant and discoverable. *Id.* at 31. It noted that a party is not relieved from responding to a discovery request simply by objecting that it would be unduly burdensome to do so. *Id.* at 35.

Like Respondent, the *Zahorik* defendant claimed that the information requested by the plaintiff was not readily accessible from one source. The court held that the defendant's argument was an attempt to prevent plaintiff from adequately preparing her case and noted that compilation of the requested material was solely in the defendant's custody and control. Consequently, it ruled that, despite the burden the defendant may have in producing the requested material, it would be "grossly unjust" to restrict the plaintiff's access to it. *Id.* at 36.

Flanagan v. Travelers, Ins. Co., 111 F.R.D. 42 (W.D.N.Y. 1986), endorses the Second Circuit's position that evidence of prior complaints of discrimination is relevant and discoverable. Like Respondent, the *Flanagan* defendant owned several places of business. The plaintiff worked at only one of the defendant's offices. The defendant sought to limit discovery of prior discrimination complaints to the plaintiff's specific job position, to the office where she worked and to two years prior to her filing of an EEOC charge.

The *Flanagan* court rejected those limitations for the following reasons: (1) the plaintiff's office did not operate independently of the other offices owned by the defendant, (2) policy concerning the defendant's personnel was dictated from the defendant's main office, (3) the plaintiff was the only employee at her

office location with her job title, (4) the time limit the defendant sought to impose on the Plaintiff's discovery did not fully cover the period during which the Plaintiff claimed she was discriminated against, (5) the defendant produced no factual allegations to support its claim that compliance with the Plaintiff's request would be burdensome and (6) those complaints of discrimination against the defendant that had reached the litigation stage were public records and therefore, their production could not violate any privacy rights of the defendant's employees.

The court added that, especially in employment discrimination cases, Fed. R. Civ. P. 26 is not to be interpreted so as to deprive a party of the discovery that is reasonably necessary to afford them a fair opportunity to develop and prepare their case. *Flanagan*, 111 F.R.D. at 46. Also, the court noted that the comparative information sought by the Plaintiff may be relevant to establish the pretextual nature of the defendant's conduct. Furthermore, for the purposes of Rule 26, relevance cannot be equated with admissibility at trial. Therefore, there was no merit to the defendant's claims that the material requested by the Plaintiff was irrelevant.

Respondent does not operate a franchise. Whatever its organizational and geographic structure may be, its employment policies were not implemented on a store by store basis. As in *Flanagan*, its personnel policies were dictated from its main office. Moore supervised Petitioner from his Ohio office. Respondent's employment decisions were not made at its district or regional level. Therefore, Petitioner's discovery into Respondent's employment policies and

its prior history of employment discrimination should not be limited to those organizational levels.

Furthermore, Petitioner is the only employee at her job location with her job title and responsibilities. Also, she is also the only black security supervisor in those stores. The *Flanagan* court found that limiting its Plaintiff's discovery of prior discrimination complaints to those made by personnel with the Plaintiff's job title and to those arising out of the location where she worked was tantamount to no discovery at all. *Id.* The same would be true in Petitioner's case.

Petitioner must rely on evidence of prior discriminatory conduct to show that Respondent knew of discrimination against her and others, failed to implement reasonable measures to handle complaints about discrimination and thereby fostered a work environment where discrimination could proliferate. In this respect, she is no different from the plaintiffs in the forgoing cases.

Without regard to established precedent, the court summarily granted Respondent's request to shield it from producing evidence of its prior discriminatory conduct. Hence, the court imposed upon Petitioner the blanket exclusion frowned upon by the court in *Estes*. The District Court's exclusion exceeded even the scope of Rule 403. That rule does require the court to weigh the probative value of evidence a plaintiff seeks against its prejudicial effect. In this case, the District Court failed to do even that. Petitioner was denied the opportunity to obtain evidence that various courts have ruled is relevant and admissible.

A court's exclusion of prior conduct as evidence

in a discrimination case, should not prevent the plaintiff from proving her case. *Id.* The District Court was aware that Petitioner sought to show that Respondent knew of and condoned a work atmosphere in which she and co-workers were discriminated against. By limiting Petitioner's discovery requests for prior complaints of discrimination to those involving Williams, that court committed the error that the *West* court deemed to be an abuse of discretion.

The District Court's ruling clearly was in conflict with rulings of this Court and of several of its sister courts. Its erroneous ruling imposed an unjustified handicap on Petitioner's ability to prove material elements of her discrimination and retaliation claims. Permitting Petitioner to obtain the evidence she sought would not have unfairly prejudiced Respondent nor imposed a burden as great as that placed on Petitioner.

The District Court had alternatives to precluding Petitioner's discovery. It was entirely within the court's discretion to examine any evidence produced by Respondent and to exclude it during trial if it proved to be unduly prejudicial. Alternatively, the court could have followed the direction of the *Heyne* court, which suggested the use of a jury instruction as to the weight the evidence should be given. *Heyne* at 1481. In light of these alternatives, and the conflict with valid legal precedent the court's rulings were egregious enough to be and should have been overruled by the Court of Appeals.

II. The Court of Appeals Failed to Apply the Correct Standard of Review to the District Court's Grant of Summary Judgment

This Court and all other federal appellate courts universally apply *de novo* standard of review to a district court's grant of summary judgment and use the same standards of review as the lower court did. *See, e.g., Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 466 (1992); *King v. Ames*, 179 F.3d 370, 373 (5th Cir. 1999), *cert. denied*, 519 U.S. 1055 (1997); *McCaslin v. Wilkins*, 183 F.3d 775, 778 (8th Cir. 1999); *Byers v. City of Albequerque*, 150 F.3d 1271, 1274 (10th Cir. 1998); *Higgins v. E.I. Dupont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1998); *National Wildlife Federation v. Browner*, 127 F.3d 1126 (D.C. Cir. 1997); *Bedoya v. Coughlin*, 91 F.3d 348, 351 (2d Cir. 1996); *Dominique v. Weld*, 73 F.3d 1156, 1158 (1st Cir. 1996); *Olson v. General Elec. Aerospace*, 101 F.3d 947, 951 (3d Cir. 1996); *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996), *cert. denied*, 118 S. Ct. 48 (1997); *Hairston v. Ginesville Sun Publ'g Co.*, 9 F.3d 913, 918 (11th Cir. 1993); *Wilson v. Williams*, 997 F.2d 348, 350 (7th Cir. 1993).

The Court of Appeals failed to apply the de novo standard of review to Petitioner's appeal of the District Court's erroneous grant of summary judgment to Respondent. Instead, it relied on the District Court's reasoning and analysis without reviewing the record before the court. In reviewing a district court's summary judgment, an appellate court views the evidence before it in the light most favorable to the appellant. The appellate court must reverse the summary judgment if there is any record in the

evidence that does not support the district court's decision. *See, e.g. Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 249-59 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Had the court applied the de novo standard of review, the Court of Appeals could not have affirmed the District's Court's dismissal of Petitioner's retaliation claim.

A plaintiff's claim of retaliation may be established using the burden-shifting approach set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 96 S. Ct. 1817 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 1010 S. Ct. 1089 (1981); *Wilborn v. Primary Care Specialists, Ltd.*, 866 F. Supp. 364, 370 (N.D. Ill. 1994). Under this approach, the plaintiff first must establish a prima facie case of retaliation. To do so, she must show that (1) she participated in a statutorily protected activity or opposition; (2) her employer was aware of the activity; (3) she suffered an adverse action by her employer; and (4) there was a causal connection between the protected expression and the adverse action. *Boyce v. New York City Mission Soc'y*, 963 F. Supp. 290, 295 (S.D.N.Y. 1997).

If the plaintiff's prima facie case is established, the defendant must provide a legitimate, non-discriminatory reason for the complained of action. Should the defendant provide a seemingly non-discriminatory reason for its action, the plaintiff must prove that it is pretextual and that retaliation was a substantial factor in the adverse employment action decision.

The record before the District Court clearly established Petitioner's prima facie case of retaliation. However, in reviewing Petitioner's retaliation claim,

the District Court addressed only the causation element of this claim. It dismissed Petitioner's retaliation claim on the grounds that Petitioner failed to proffer a motive for Moore's retaliation against her and that, before placing her on probation, Moore did not know about Petitioner's complaint about Williams.

To reach its finding that, on August 22, 1999, when he gave Petitioner a probationary memorandum that he and Ramsey prepared, Moore did not know that Petitioner had complained about Williams, the District Court would have had to completely ignore Moore's deposition testimony. On pages 77 through 79 of his deposition, Moore himself admits that he knew of Petitioner's complaint when he put her on probation. He learned about it from Khan, Ramsey and Brocious. The deposition testimony on those pages reads in part:

Q. In August, 1996, were you aware of an incident between Mr. Williams and – Mr. Williams and Miss Khan?

....

A. Yes.

Q. How did you become aware of the incident?

A. Jane told me and Zyroon told me.

Q. What did Jane tell you?

A. Jane told me there was an issue with Powell and with Zyroon concerning their working relationship, which allegedly started from a situation where Zyroon had wanted to check Powell's bag when he was leaving the store, and Powell supposedly didn't cooperate with that. And then Zyroon reported that to Dean and Powell found out about that and was upset with Khan over that – over her turning it into

something that it wasn't

....

Q. What did Miss Khan tell you?

A. Khan told me that she had -- Powell was leaving one day, he had worked all night, she was going to check his bag, they kind of laughed about it, because apparently he had some dirty laundry in there. She had told Dean about. Later on, Powell had been upset because she had reported to Dean that perhaps he was stealing from the store.

A. Did you gain anymore information about that incident?

Q. Talked to Dean about it. He said that the issue had occurred somewhat like that. He didn't really know that anything was going on with Powell about it, that Powell supposedly had made a comment about Zyroon. He had talked to both of the parties about it and considered it a resolved issue.

This deposition testimony was submitted to the District Court annexed to Petitioner's opposition to Respondent's Motion for Summary Judgment. It was submitted to the Court of Appeal in the parties' joint appendix and referred to in Petitioner's memorandum.

Moore was not the only decision-maker employed by Respondent who knew of Petitioner's complaint and affected the decision to place her on probation. Ramsey knew about the complaint against Williams and she assisted Moore in wording Petitioner's probationary memorandum.

In *Thomas v. Medco*, No. 95 Civ. 8401(JES)(MHD), 1998 U.S. Dist. LEXIS 13158 (S.D.N.Y. August 26, 1998), the defendant argued that the plaintiff could not prove

that her employer discriminated against her because the person who fired her was not the person who allegedly harassed her. The plaintiff was fired by a supervisor who relied on the job evaluations of the person who harassed the plaintiff. The court held that because the harasser could influence the decisions of the plaintiff's supervisor, a jury could find that there was discrimination. Ramsey may not have been the individual who actually told Petitioner that she was on probation. However, her ability to affect Petitioner's job is evident from the probation memorandum. Respondent could have and did retaliate against Petitioner through Ramsey as well as through Moore.

Had the Court of Appeals reviewed the record presented to the District Court, it would have found that, contrary to the lower court's finding, there was ample evidence that Respondent's "non-discriminatory reason" was a pretext for retaliation. Pretext may be demonstrated by showing that the employer's explanation for its adverse employment action is unworthy of credence or by reliance on the evidence comprising the prima facie case. *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 38 (2d Cir. 1994).

The defendant in *Chambers* claimed the Plaintiff's peers and supervisors viewed him as being a slow, lazy and lethargic employee who slept on the job and performed the functions of his job ineffectively. It was asserted that he was fired for poor job performance. The defendant submitted affidavits from employees who claimed that the supervisor who fired Plaintiff had found his job performance to be unsatisfactory. The supervisor no longer worked for the defendant and the defendant produced no testimony from him. One week

before he was fired, the plaintiff received a letter of reprimand from defendant which claimed that his job performance was below expectations and he would be fired if it did not improve significantly and immediately.

The court found that inconsistencies in the defendant's statements and actions indicated pretext and precluded summary judgment. The inconsistencies that concerned the court included the following: (1) the defendant's lack of documentation of the plaintiff's poor job performance; (2) the pre-termination letter was the first official mention Plaintiff received about the quality of his work; (3)the suggestions that the Plaintiff was slow, lazy and lethargic were first aired only after the defendant learned during the course of the lawsuit that the Plaintiff had a second job. *Chambers*, 43 F.3d at 39.

Up to the date she was placed on probation, Petitioner was a model employee. In the evaluation she received just five months before her probation, her supervisor at that time, recommended that she receive a merit salary increase. He rated her integrity and trust as highly effective, the highest rating available on the evaluation. Petitioner received a highly effective rating for taking responsibility for her actions and exceeded expectations in reducing the level of external theft. In the comments section, Brocious wrote that Petitioner had "done A VERY good job with Excellent Results: She needs more challenge & responsibility. Skills must be developed for future opportunities Id.

As in *Chambers*, the inappropriate behavior Petitioner's peers and management were concerned about was mentioned for the first time only after she

complained about racism. It cannot be narrowed down to any specific action on Petitioner's part. The complaints cannot be attributed to any specific person or persons. As to the alleged sensormatic incident, the only document evidencing Petitioner's alleged terminable offense was prepared was prepared two years after the alleged incident occurred and only in anticipation of Petitioner's deposition.

Ramsey claims that Brocious was very concerned about the sensormatic incident. Additionally, she stated that if a report had been made about the incident, Brocious would have made it. There was no report of the incident made until Petitioner filed this suit. If the sensormatic incident did occur, was indeed a terminable offense, and worried Brocious as much as Ramsey claims it did, surely he would have documented it in Petitioner's file.

The lack of corroboration for the claims Respondent makes regarding Moore's probationary memorandum cast enough doubt on Respondent's version of the facts surrounding Petitioner's probation for a rational jury to conclude that it lied about the reasons for the actions taken against Petitioner.

The District Court held that Petitioner could not prove Moore's motive for her probation was retaliation because Moore believed the sensormatic incident occurred and Khan cannot disprove this belief. Motive is a credibility issue and, as such, is a factual issue for a jury to resolve. It was not the province of the District Court to decide whether Moore was more credible than Petitioner. Petitioner said the incident did not occur. Only a jury had the right to judge the credibility of these two individuals. Furthermore, the court's finding

is not supported by the record.

A plaintiff can rely on circumstantial evidence to meet her burden of proof. *See, McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). *See also, U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 71, 103 S.Ct. 1478 (1983) (holding that, as in any lawsuit, the plaintiff may prove her case by direct or circumstantial evidence). A plaintiff's reliance on circumstantial evidence applies both to her prima facie case and to pretext.

In *Henry v. Daytop Village, Inc.*, 42 F.3d 89 (2d Cir. 1994), the Plaintiff was accused of violating her employer's disciplinary code by misrepresenting her husband's insurance coverage on her application for medical benefits. She was fired. In denying the defendant's motion for summary judgment, the court held that the Plaintiff's denial of the defendant's charges against her was sufficient to raise a material factual dispute.

According to the Second Circuit Court of Appeals, "If a rational jury accepted Henry's version of the facts, then it might conclude that Daytop had trumped up charges as a pretext for firing her. The question then arises whether Henry has presented enough evidence to create a genuine dispute over whether she did, in fact, misrepresent her husband's insurance coverage to Daytop". *Id.* at 96.

The plaintiff's assertion that she made no misrepresentation to the defendant was sufficient to create the material factual dispute required for denial of summary judgment to defendant. Specifically, the court ruled that, "To the extent that a reasonable jury might decline to credit Daytop's proffered reason for

firing Henry - especially if coupled with a suspicion that Daytop had lied about that reason - the jury could reasonably infer discriminatory intent". *Id.* The genuine material factual dispute was whether the Plaintiff was innocent of the charges leveled at her by the defendant.

Moore met with Petitioner in early August of 1996 before he gave her the probation memorandum. During that conversation Moore asked Petitioner about the alleged sensormatic incident. She told him she did not exit a store with a sensormatic in her pocket. Petitioner consistently denied that the sensormatic incident occurred. Moore stated that the only witness who was present during the alleged incident was Petitioner. Based on *Henry,* Petitioner's denial of the sensormatic incident was sufficient evidence to preclude a grant of summary judgment on the grounds that the Petitioner could not show pretext.

The court that affirmed Respondent's summary judgment in this case is the same court which reversed in part, the district court's grant of summary judgment in *Henry.* In that case, it held that with respect to the plaintiff s claim that her employer falsely accused her of misconduct, it was highly material whether she had engaged in the misconduct or not. The question to be decided on summary judgment was whether the plaintiff had presented sufficient evidence to create a genuine dispute over whether she engaged in the misconduct.

In this case, Petitioner did present sufficient evidence to create such a dispute. Respondent claimed that the sole reason Petitioner was placed on probation was the sensormatic incident. However, the probation

memorandum contradicts this claim. It clearly shows that as in *Chambers*, the defendant in this case created claims of misconduct by Petitioner in order to bolster the alleged legitimacy of her probation.

Furthermore, Respondent produced no credible or admissible evidence that Khan committed the acts she was accused of. There was no evidence of what she allegedly said or did. Respondent could not identify anyone that she had gossiped with, lied to or manipulated. Moore testified that he was not sure that the alleged misconduct even occurred.

The only evidence of Petitioner's misconduct is hearsay from Ramsey. For example, the probation memorandum accused Khan of failing to report a sexual harassment concern. When asked what that concern was, Moore's response was, "I don't know the particulars of that". He then stated that it was Ramsey who told him that Khan failed to make a report.

Nonetheless, the brief it filed with the appellate court, Respondent made much of the fact that Khan cannot show discriminatory animus on Respondent's part because, other than her own, Petitioner did not know of any other complaints of discrimination. Specifically, the Brief for Defendant-Appellee at 2 –3 stated that, "Khan is unaware of any Abercrombie associate violating Abercrombie's Equal Employment Opportunity policy. Khan is unaware of any Abercrombie associate other than Powell Williams violating Abercrombie's Policy Statement of Respect".

As to the sensormatic incident, the only evidence A&F produced to support its claims that it occurred is testimony from Moore which in turn is supported by a hearsay statement from Carriero - a hearsay statement

that was prepared the evening before Petitioner's deposition and one year after he allegedly told Moore about the sensormatic incident. Moore claims that the sensormatic incident Khan was accused of is a terminable offense and the real reason she was placed on probation. However, the statement he relies on now that her probation is the subject of litigation was never made a part of her personnel records. Nothing about this "terminable offense" was ever placed in Petitioner's file until she sued Respondent for discrimination and retaliation.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

Dated: May 17, 2000

APPENDIX

A. COURT OF APPEALS' SUMMARY ORDER ..... App. 1

B. ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK AFFIRMING THE DISCOVERY RULINGS OF MAGISTRATE JUDGE JOAN M. AZRACK ..... App. 4

C. MEMORANDUM AND ORDER THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ..... App. 5

D. JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT ..... App. 20

E. DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS ..... App. 21

UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of December, one thousand nine hundred and ninety-nine.

Present: HONORABLE RALPH K. WINTER,
Chief Judge,

HONORABLE JAMES L. OAKES,
HONORABLE SONIA SOTOMAYOR,
Circuit Judges.

ZYROON KHAN,

Plaintiff-Appellant,

- v. - No. 99-7399

ABERCROMBIE & FITCH,

Defendant-Appellee.

Appearing for Appellant: Charmaine M. Stewart, Charmaine M. Stewart & Associates, Rosedale, New York.

Appearing for Appellee: Jonathan W. Norman, Ochs & Goldberg, New York, New York (Jonathan M. Norman, Melinda R. McAfee, Vorys, Sater, Seymour and Pease LLP, Columbus, Ohio, of counsel).

Appeal from the United States District Court for the Eastern District of New York (Glasser, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court is hereby AFFIRMED.

Zyroon Khan appeals from Judge Glasser's adverse grant of summary judgment dismissing her race discrimination claims brought against Abercrombie & Fitch pursuant to Title VII, Section 1981, and the New York Human Rights Law. We affirm the grant of summary judgment for substantially the reasons stated by the district court. See Khan v.

Abercrombie & Fitch, Inc., 35 F. Supp. 2d 272 (E.D.N.Y. 1999). We also affirm the district court's challenged discovery rulings. Because appellant's broad discovery request for all complaints of discrimination against Abercrombie & Fitch nationally for the preceding ten years was not reasonably calculated to elicit admissible evidence and would have imposed greater costs on appellee than benefit to appellant's case, see Fed. R. Civ. P. 26(b), the magistrate judge was well within her discretion in denying the request. See Soobzokov v. CBS, Inc., 642 F.2d 28, 30 (2d Cir. 1981) (discovery rulings reviewed for abuse of discretion).

FOR THE COURT:
KAREN GREVE MILTON, Acting Clerk

/s/ Karen Greve Milton
By: Date

RALPH A. ANDERSON, Deputy Clerk
ACTING OPERATIONS MANAGER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x

ZYROON KHAN,

Plaintiff,

ORDER
97-CV-2461(ILG)

-against-

ABERCROMBIE & FITCH and
THE LIMITED,

Defendants.

----------x

GLASSER, United States District Judge:

The plaintiff, Zyroon Khan, has appealed from the discovery rulings of Magistrate Judge Joan M. Azrack dated January 9, 1998 and June 23, 1998. A careful review of all of the submissions, and for the reasons stated on the record, leaves the court to conclude that the orders of the Magistrate Judge were neither clearly erroneous nor contrary to law and therefore plaintiff's appeal is denied and the orders are hereby affirmed.

SO ORDERED.

/s/
United States District Judge

Dated: New York, New York
September 10, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

ZYROON KHAN,

Plaintiff,

-against-

MEMORANDUM & ORDER
97-CV-2461 (ILG)

ABERCROMBIE & FITCH, INC.,

Defendant.

----------X

GLASSER, United States District Judge:

BACKGROUND

Zyroon Khan ("Khan" or "Plaintiff"), a black woman, filed this complaint against her employer, Abercrombie & Fitch ("A&F"), alleging that it discriminated against her on the basis of her race and color in violation of Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"), 42 U.S.C. § 1981; and N.Y. Exec Law § 296 et seq.[1] A&F now moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure.

FACTS

A&F is a national clothing retailer operating

[1] Plaintiff's complaint originally alleged additional causes of action for Defamation and Breach of Implied Contract. She has withdrawn those claims. Pl. Rule 56.1 Statement ¶ 32.

approximately 170 stores nationwide. The plaintiff works as a Security Supervisor in the Security Department of A&F, which consists of a Director of Security, Investigators, Security Supervisors and Security Guards.

A&F hired Khan as a Shipping and Receiving Manager on December 1, 1987. On March 12, 1995, she was promoted to Security Supervisor and she is currently employed in this position. As Security Supervisor, Khan's duties include observing and correcting problems within a store that may lead to greater theft, managing security guards and performing "bag checks" (when A&F employees leave an A&F store, they have their bags checked for any stolen Abercrombie merchandise). Def. Rule 56.1 Statement ¶ 3. Khan is the Security Supervisor for two A&F stores; one in Staten Island and the other located at the South Street Seaport in Manhattan.

In May of 1996, Powell Williams ("Williams"), a white male, became the District Manager of the New York District. Id. ¶ 7. On June 12, 1996, he visited the Staten Island store where Khan was working that day. Id. ¶ 13. Williams refused to allow Khan to perform a "bag check" on him when he was leaving the store. Id. The following day, Khan sent a memorandum to her supervisor, Dean Brocious ("Brocious"), regarding the incident. Id. After Khan sent the memorandum to Brocious, she learned from Greg Holtz, the A&F Staten Island Store Manager, that Williams referred to her as a "black bitch" because of the "bag check incident." Id. ¶ 14. On hearing this, plaintiff faxed another memorandum to Brocious informing him that Holtz told her that Williams called her a "black bitch." Id. ¶

15.

On August 5, 1996, Tim Moore ("Moore"), a white male, replaced Brocious as the Director of Security for A&F and became Khan's direct supervisor. Id. ¶ 25. Moore was informed by at least three A&F employees that Khan had a "credibility problem." Moore Dep. at 39. Specifically, John Carriero ("Carriero"), an A&F Security Investigator, informed Moore that Khan had followed a suspected shoplifter out of an A&F store with a "sensormatic" (a device attached to merchandise that sets off an alarm if it is not moved before exiting the store) in her pocket in order to set off the alarm system. He alleged that Khan then searched the suspected shoplifter under the pretext that the putative shoplifter had set off the alarm. Def. Rule 56.1 Statement ¶ 26.

Despite the fact that Moore thought the sensormatic incident was a terminable offense, he decided to place Khan on probation. Moore Dep. at 72. On August 13, 1996, A&F's Vice President of Human Resources, Jane Ramsey, and Moore prepared a "probation memorandum" for Khan. It read as follows:

> The following are issues of concern that must be addressed immediately.
>
> Credibility: You have not yet earned the trust and credibility of many important people in your district. You are perceived to exaggerate and be manipulative. You are seen by some as having an intimidating style.
>
> Goal: Establish credibility with your peers and

the management in your district. Work to be seen as a direct, truthful individual who can present the unvarnished truth in an appropriate and helpful way. Don't gossip; don't misrepresent situations. Work to be more approachable.

Judgment: Your judgment in handling situations has been questionable, and needs improvement; e.g. you did not inform Human Resources about a sexual harassment concern that was raised, and you exited the building with sensormatics in your pocket as discussed.

Goal: Operate within the role and scope of your position. Do not, for instance, assume the role of Investigator. Make good decisions about whom to inform about situations and how to follow up on issues and concerns. Ensure that your methods are ethical and that you protect the company by operating within our standards and guidelines.

I understand that over the next 90 days, I am expected to meet the above goals or I will be terminated from employment with the company. I further understand that, if at any time during this period, it is determined that I am making insufficient progress towards achieving these goals, further disciplinary action up to and including immediate termination will result.

Pl. Mem. Ex. C. Khan refused to sign the memorandum

because she believed it contained untrue allegations about her. Khan Aff. ¶ 23.

On August 22, 1996, Moore met with Khan to give her a performance review. Pl. Rule 56.1 Statement ¶ 10. During the review, Moore told her that she was being placed on probation and gave her the probation memorandum. Khan was also told that her investigative duties would be reduced. Moore Dep. at 63.

On August 28, 1996, Khan filed a charge of discrimination with the New York Human Rights Commission on the grounds that she was put on probation and retaliated against by A&F for here complaints about Williams' comment.

On October 2, 1996, Williams received a written "Final Warning" for calling Khan a "black bitch." Id. ¶ 21. This "Final Warning" was placed in Williams' permanent personnel file. Id.

Since Williams' reprimand, he and the plaintiff have not had any reported incidents or difficulties. Id. ¶ 24. Williams is still the District Manager for New York. Id.

Moore removed Khan from probation on November 18, 1996. Def. Rule 56.1 Statement ¶ 31. During the time that Khan was on probation, her job title, salary and benefits remained the same. Id. Khan has not been put on probation nor disciplined since she was removed from probation. Id. Khan has received two salary raises since her probation. Id.

On January 31, 1997, Khan received a Right-to-Sue Letter from the Equal Employment Opportunity Commission ("EEOC"). Pl. Rule 56.1 Statement ¶ 31. On May 2, 1997, she filed this action against A&F on the

grounds that it discriminated and retaliated against her and subjected her to a hostile work environment. Id. at ¶ 31.

On October 12, 1997, after discovery was taken, A&F moved for summary judgment. For the reasons that follow, its motion is granted.

DISCUSSION

1. Summary Judgment Standard of Review

Summary judgment under Rule 56 is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The moving party bears the burden of proof on such motion. See United States v. All Funds, 832 F. Supp. 542, 550-51 (E.D.N.Y. 1993).

If the summary judgment movant satisfies its initial burden of production, the burden of proof shifts to the nonmovant who must demonstrate that a genuine issue of fact exists for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). A genuine factual issue exists if there is sufficient evidence favoring the nonmovant such that a jury could return a verdict in its favor. Id. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Rule 56(e) "requires the nonmoving party to go beyond

the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admission on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Celotex, 477 U.S. at 324. Once the nonmovant has adduced evidence of a genuine issue of material fact, its "allegations [will be] taken as true, and [it] will receive the benefit of the doubt when [its] assertions conflict with those of the movant.' Samuels v. I. Mockry, et al., 77 F.3d 34, 26 (2d Cir. 1996).

In employment discrimination cases, courts are particularly cautious about granting summary judgment where intent is at issue. See Schwapp v. Town of Avon, 118 F.3d 106, 119 (2d Cir. 1997). However, even in these cases a "plaintiff must provide more than conclusory allegations of discrimination to defeat a motion for summary judgment." Id.

II. Race Discrimination

A. Legal Standard[2]

The relevant section of Title VII, declares it to

> be an unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or

---

2 Plaintiff has brought race discrimination claims under Title VII and §1981– this Court uses the same legal standard to evaluate both. See Choudhury v. Polytechnic Institute of New York, 735 F.2d 38, 44 (2d Cir. 1984) (holding that the "same elements constitute a claim for employment discrimination under §1981 as under Title VII").

> otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;...

In a series of decisions, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) and St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), the Supreme Court set forth the allocations of burdens and orders of presentation in a Title VII case. First, "the plaintiff has the burden of proving by a preponderance of evidence a *prima facie* case of discrimination." Burdine, 450 U.S. at 252-53. Second, "if the plaintiff succeeds in proving the *prima facie* case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the [adverse employment decision]." Id. at 253. Third, "should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." Id.

In this case, to establish a prima facie case of discrimination, plaintiff is required to establish (1) that she is black, (2) that she performed her job at A&F in a satisfactory manner, (3) that she was subject to an adverse employment action, and (4) that the decision occurred under circumstances giving rise to an inference of discrimination. See McDonnell Douglas,

411 U.S. at 802; Quarantino v. Tiffany & Co., 71 F.3d 58, 64 (2d Cir. 1995).

A&F concedes that Khan can satisfy the first two prongs of her prima facie case – that she is a member of a protected class and that her job performance is satisfactory. Def. Mem. at 8. It argues, however, that Khan is unable to show that she was subjected to any adverse employment action nor can she demonstrate that any such action occurred under circumstances giving rise to an inference of unlawful discrimination. Id.

B. The Discriminatory Conduct

Khan alleges that she suffered an adverse employment action when Williams called her a "black bitch."[3] Williams' comment is condemnable, but is not, without more, actionable. See, e.g., Schwapp v. Town of Avon, 118 F.3d 106, 110 (2d Cir. 1997) ("utterance of an ... epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII") (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 23) (1993) (other internal quotations omitted); see also Snell v. Suffolk County, 782 F.2d 1094, 1102 (2d Cir. 1986) (stating that a few isolated incidents of racial enmity do not give rise to a Title VII violation); Abidekun v. New York City Transit Authority, 1998 WL 296372 (E.D.N.Y. June 4, 1998)

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3 Plaintiff has also stated that her receipt of the probation memorandum was an adverse employment action. However, that memorandum was given to her only after she complained of Williams' racist behavior and is accordingly analyzed as part of plaintiff's retaliation claim discussed, *infra*.

(same). Khan does not allege any other incidents of discriminatory conduct. As such, this Court finds that she did not suffer an adverse employment action.

Because Khan fails to show that she suffered an adverse employment action, she cannot establish a prima facie case of employment discrimination under Title VII or § 1981 and A&F is entitled to summary judgment on her claim of race discrimination.

III. Hostile Work Environment

A hostile work environment exists "when the workplace is permeated with discriminatory intimidation, ridicule and insult, that is sufficiently severe to alter the conditions of the victim's employment." Torres v. Pisano, 116 F.3d 625, 630-31 (2d Cir. 1997) (quoting Harris, 510 U.S. at 21). "Conduct that is 'merely offensive' and 'not severe or pervasive enough to create an objectively hostile or abusive work environment – an environment that a reasonable person would find hostile or abusive – is beyond Title VII's purview.'" Torres, 116 F.3d at 612 (quoting Harris, 510 U.S. at 21). "Thus, as a general rule, episodic, isolated incidents of harassment do not give rise to a Title VII claim; rather the incidents must be sufficiently continuous and concerted in order to be deemed pervasive." Abidekun, 1998 WL 296372 * 6 (quotations and citations omitted).

Khan admits that she was never discriminated against in any of her previous years of employment with A&F. Khan Dep. at 225. Accordingly, as a matter of law, this Court determines that Khan's single allegation of discrimination does not give rise to a claim

of hostile work environment and summary judgment for the defendants is granted on this issue. See, e.g., Abidekun, 1998 WL 296372 (summary judgment granted where plaintiff made no showing of pervasive or continuous conduct).

IV. Retaliation

Title VII forbids an employer to retaliate against an employee for engaging in protected activity. See 42 U.S.C. § 2000e-3(a). Khan cannot establish a *prima facie* case under a retaliation rubric. To establish a *prima facie* claim for retaliation, Khan would need to show that she (i) participated in a protected activity known to the defendants; (ii) suffered an adverse employment action; and (iii) that there is a causal connection between the protected activity and the adverse employment action. See Tomka v. Seiler Corp., 66 F.3d 1295, 1308 (2d Cir. 1995). In analyzing her retaliation claim, this Court uses the same tripartite McDonnell Douglas analysis discussed, *supra*, in Section II, A. Garber v. The New York City Police Dep't., 1998 U.S. App. LEXIS 20181 (2d Cir. June 12, 1998).

A. The Probation Memorandum

Khan is unable to satisfy the causation element of her retaliation claim. She avers that she received the probation memorandum from Moore as a result of her complaint about Williams. A&F responds that Moore placed Khan on probation because of the "sensormatic incident." Once A&F puts forward a legitimate reason for placing Khan on probation, she must reply by

showing that reason to be "merely a pretext for retaliation and that the employer's action was prompted by an impermissible motive." Tomka v. Seiler Corp., 66 F.3d 1295, 1308 (2d Cir. 1995).

Here, Khan is unable to show that A&F's stated reason for placing her on probation was a pretext for retaliation. Moore testified that he gave Khan the memorandum because of the "sensormatic" incident. Moore Dep. at 72. Khan has not proffered any motive for why Moore would want to retaliate against her. She admits that she did not tell him about her complaint regarding Williams and points to no evidence in the record that would demonstrate that Moore knew about the complaint. Nor is there evidence that Moore even knew Williams prior to placing Khan on probation. Khan's conclusory assertion that she was disciplined due to her complaint about Williams is insufficient to show pretext. See Ying Jing Gan v. City of New York, 996 F.2d 522, 532 (2d Cir. 1993) (When construing facts in the summary judgment context, a plaintiff must produce evidence in the record and "may not rely simply on conclusory statements or on contentions that the affidavits supporting the motion are not credible."); Moorer v. Grumman Aerospace Corp., 964 F. Supp. 665, 674-75 (E.D.N.Y. 1997) (conclusory allegations not sufficient to create genuine issue of material fact).

Khan also points to her exemplary record prior to her complaint as evidence that the sensormatic incident was pretextual. She states that before the incident with Williams, she had never received a disciplinary memorandum and disputes the content of the probation memorandum she did receive. On this point, Moorer is instructive:

> An employee's opinion that a performance review was unfair, supported only by her own conclusory statements to that effect, cannot bootstrap her claims into a Title VII claim of discrimination. Nor can prior good evaluations of the plaintiff's work performance alone establish that later unsatisfactory evaluations are pretext for unlawful discrimination.

964 F. Supp. at 674 (internal quotations and citations omitted).

Khan also claims that the sensormatic incident – A&F's purported reason for placing her on probation – did not take place and that Carriero lied when he told Moore that the event occurred. See Khan Dec. 2, 1998 Aff. ¶¶ 17, 19. However, even assuming *arguendo* that Carriero did lie to Moore about the incident, Khan has not alleged that Moore knew, or should have known, that Carriero's account was false. As such, Moore's testimony stands uncontradicted; he placed Khan on probation based on his knowledge of the sensormatic incident. There is nothing in the record to support a finding that he did not believe the incident occurred and, accordingly, Khan cannot demonstrate pretext.[4]

B. The Failure to Promote

In order for Khan to establish a prima facie case of employment discrimination due to A&F's failure to promote her, she must show: (1) that she belongs to a

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4 Because Khan cannot establish a causal connection between her complaint about Williams and Moore's decision to place her on probation this Court does not address the "protected activity" and "adverse employment action" prongs of Khan's retaliation claim

protected class; (2) that she applied for and was qualified for the position sought; (3) that she was not given the position; and (4) that the position sought was ultimately filled by a person not in the protected class or that the position remained open and the employer continued to seek applicants. Little v. State of New York, 1998 WL 306545 (E.D.N.Y. 1998).

Here, Khan cannot satisfy the final element of her prima facie case – that the position sought was ultimately filled by a person not in the protected class or remained open. Ramsey's uncontradicted testimony is that there have been no open Investigator positions (the position for which Khan sought promotion) at A&F between the time Khan complained and the filing of this case. As such, Khan cannot show that she has been disadvantaged in comparison to other A&F employees by her failure to be promoted and that claim fails. See, e.g., Little at *4 (failure to promote claim dismissed for plaintiff's failure to demonstrate that his employer continued to seek applicant for a position after he was not promoted).

V. Pendent State Law Claims

Plaintiff's claims under N.Y. Exec Law § 296 et seq. are dismissed. As the Second Circuit recently observed, "[w]e have frequently noted that claims brought under New York State's Human Rights Law are analytically identical to claims brought under Title VII." Torres v. Pisano, 116 F.3d 625, 629 n.1 (2d Cir. 1997). See also Van Zant v. KLM Royal Dutch Airlines, 80 F.3d 708, 714-715 and 716 n.6 (2d Cir. 1996) (same); Ramos v. City of New York, 1997 WL 410493, *5

(S.D.N.Y. 1997) (same); Owens v. Waldorf-Astoria Corp., 1997 WL 251556 (S.D.N.Y. 1997) (same). Plaintiff's inability to establish a *prima facie* case under Title VII is fatal to her claims under state law.

CONCLUSION

For the foregoing reasons, defendant's motion for summary judgment is granted and summary judgment on all claims is awarded to the defendant.

SO ORDERED.

/s/ I. Leo Glasser
United States District Judge

Dated: New York, New York
February 26, 1999

A copy of the foregoing order was this day mailed to:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

ZYROON KHAN,

Plaintiff,

-against-

JUDGMENT
97-CV-2461 (ILG)

ABERCROMBIE & FITCH, INC.,

Defendant.
----------X

A Memorandum and Order of the Honorable I. Leo Glasser, United States District Judge, having been filed on March 4, 1999, granting the defendant's motion for summary judgment; it is

ORDERED and ADJUDGED that the plaintiff take nothing of the defendant; and that the defendant's motion for summary judgment is granted.

Dated: Brooklyn, New York
March 9, 1999

/s/ Robert C. Heinemann
ROBERT C. HEINEMANN
Clerk of Court

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

ZYROON KHAN,	:	
	:	
Plaintiff	:	
	:	Case No.: 97 Civ. 2461
v.	:	
	:	Glasser, J.
ABERCROMBIE & FITCH AND THE LIMITED,	:	
	:	
Defendants.	:	

DEFENDANT'S RESPONSES TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION OF DOCUMENTS

10. All documents which refer or relate to defendant's policy regarding discrimination in the workplace. State how many discrimination charges have been filed against you within the past ten years, the outcome of such charges and the race and gender of the charging parties.

OBJECTION:

Defendant objects to this Request to the extent it asks Defendant to state how many discrimination charges have been filed against it within the past ten years, the outcome of such charges and the race and gender of the charging parties. Said request is not a request for the production of documents and is more

properly the subject of an Interrogatory. Defendant also objects to this request in that it is not reasonably calculated to lead to the discovery of admissible evidence and that it is overly broad as to time and scope and is unduly burdensome and oppressive.

RESPONSE:

Subject to and without waiving the above objections, there have been no charges which involve either Tim Moore or Jane Ramsey. With respect to the remainder of this Request, not objected to above, please see response to Request Number 9.